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INDIRA GANDHI MUTHO v. KETUA POLIS NEGARA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-21NCvC-90-10-2020]
28 JUNE 2024

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Abstract – *Pursuant to s. 5 of the Government Proceedings Act 1956, the tort of nonfeasance in public office had been accorded with statutory recognition in Malaysia. Liability can be imposed towards the Government or its public officers, not only in the event of a breach of a statutory duty, but also in the event of contempt of a court order.*

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TORT: *Nonfeasance – Nonfeasance in public office – Failure to perform statutory duty – Allegation that Inspector General of Police ('IGP') and Royal Malaysia Police ('PDRM') failed to execute committal and recovery orders granted by High Court – Failure by IGP and PDRM to take all necessary steps to locate former husband and retrieve daughter who was forcibly taken away despite knowing their whereabouts – Whether tort of nonfeasance in public office given statutory recognition in Malaysia – Whether order of mandamus granted by High Court only in respect of committal order – Whether dispute between parties evolved into challenge towards administration of justice – Whether allegation that PDRM had conducted fake investigation could be concurred*

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CIVIL PROCEDURE: *Declaration – Application for – Allegation that Inspector General of Police ('IGP') and Royal Malaysia Police ('PDRM') failed to execute committal and recovery orders granted by High Court – Failure by IGP and PDRM to take all necessary steps to locate former husband and retrieve daughter who was forcibly taken away despite knowing their whereabouts – Whether tort of nonfeasance in public office given statutory recognition in Malaysia – Whether order of mandamus granted by High Court only in respect of committal order – Whether dispute between parties evolved into challenge towards administration of justice – Whether allegation that PDRM had conducted fake investigation could be concurred*

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The plaintiff and Pathmanathan, prior to their divorce, were married since 1993. Pursuant to that, they were blessed with three children; the youngest was Prasana Diksa ('children'). In early March 2009, Patmanathan together with the children, converted to Islam without the plaintiff's knowledge. Later that year, the Perak Syariah High Court granted Patmanathan the custody of the children. This caused the plaintiff to file an application for the custody of the children in the Ipoh High Court, which was allowed. However, despite that, Patmanathan forcibly took Prasana Diksa, who was only two years old at that time, away from the plaintiff. When Patmanathan

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refused or neglected to return Prasana Diksa, the plaintiff filed an application at the Ipoh High Court for: (i) a warrant of committal/committal order that Patmanathan be committed to prison until his contempt towards the High Court custody order was purged by the return of Prasana Diksa to the plaintiff ('committal order'); and (ii) a recovery order that the court bailiff and the second defendant, the Polis Diraja Malaysia ('PDRM'), be directed to search, retrieve and return Prasana Diksa to the plaintiff ('recovery order') ('Ipoh High Court orders'). The Ipoh High Court orders were not executed by the first defendant, the Inspector General of Police ('IGP') of that time. According to the IGP, due to the existence of two conflicting custody orders, the execution of one custody order would result in the contempt of the other. This forced the plaintiff to apply to the Ipoh High Court for judicial review, for an order of *mandamus* to compel the IGP to execute the Ipoh High Court orders ('*mandamus* order'). After the judicial review application was allowed, the IGP filed an appeal to the Court of Appeal. The appeal was allowed and the *mandamus* order was set aside. Aggrieved, the plaintiff filed an application for leave to appeal further to the Federal Court. Leave was granted, and the plaintiff's appeal was allowed. The *mandamus* order was hence reinstated, but only in respect of the committal order. Dissatisfied with the IGP's alleged lack of interest in apprehending Patmanathan and handing over Prasana Diksa, the plaintiff initiated the present application. In this application, the plaintiff sought: (i) a declaration that the IGP, by failing to take all the necessary steps to apprehend Patmanathan and retrieve Prasana Diksa, had committed the tort of nonfeasance in public office; (ii) a declaration that the second to fourth defendants, respectively, the PDRM, the Ministry of Home Affairs and the Government of Malaysia, were vicariously liable for the alleged tort committed by the IGP; and (iii) general, aggravated and exemplary damages for the pain and anxiety suffered by the plaintiff due to the prolonged separation with Prasana Diksa caused by the alleged tort committed by the IGP. In contesting the application, the defendants, among others, (i) raised a preliminary issue that to establish a cause of action for nonfeasance, there must be a clear indication within the legislation that liability shall be imposed for nonfeasance. In the absence of such imposition, a person injured by a mere non-performance of a duty could not sue the public authority for damages ('preliminary issue'); and (ii) contended that the tort of nonfeasance was not actionable in this case because the *mandamus* order, which was reinstated by the Federal Court, was only related to the committal order, and not the recovery order. In support of the application, the plaintiff submitted that the elements of her claim had been proven based on four issues involving the nature and effect of the investigation by PDRM, *ie,* that PDRM had conducted a fake investigation, had failed to investigate outside of Malaysia and had not adhered to the recovery order and the order of the Federal Court. Therefore, it was

undeniable that the cause of action herein was predicated upon the tort of nonfeasance since the IGP had failed to adhere to both the *mandamus* order and the Ipoh High Court orders.

Held (dismissing application):

(1) In the case of *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* ('*Raymond*'), it was held that, 'the common law right to bring an action for negligence for breach of statutory duty has been accorded statutory recognition under the GPA 1956 (Government Proceedings Act 1956); and that the liability which has been established falls under the third class of cases – *ie*, where the statute (GPA 1956) creates a liability which does not exist at common law, *ie*, liability for acts of nonfeasance on the part of the Government in the exercise of its public duties'. Whereas in *Indira Gandhi Mutho v. Ketua Polis Negara & Ors* ('*Indira Gandhi*'), it was observed that '… the tort of nonfeasance under Malaysian law is also recognised under s. 5 of the GPA which provides that the government is liable in tort when any public officer commits any wrongful act, neglect or default in relation to a duty imposed by law. Nonfeasance in public office … actionable not only if the duty is statutory in nature (such as s. 20 of the Police Act 1967) but also, and probably even more so, if it arises from an order of court, which in this case is the committal order as well as the *mandamus* order, as affirmed by the Federal Court'. Consequently, considering the trite legal position discussed in *Raymond* and *Indira Gandhi*, the defendants' argument on the preliminary issue was therefore without merit. (paras 40, 42 & 43)

(2) It was concluded by the Federal Court that since the Perak Syariah High Court had given Patmanathan custody of the children, the High Court could not possibly issue the recovery order. In the Federal Court's view, it seemed clear as day that the Federal Court had partially upheld the decision of the Court of Appeal, which had set aside the *mandamus* order in respect of the recovery order. Hence, there was no *mandamus* order issued to the IGP to enforce the recovery order. Even if the recovery order had not been set aside, it clearly had the effect of being set aside due to the Federal Court's decision. The Federal Court found that the Ipoh High Court could not direct the IGP to execute the recovery order. Due to such finding, considering the plaintiff's statement of claim ('plaintiff's SOC'), the claim of nonfeasance in respect of the IGP's failure to execute the recovery order was clearly a non-starter and misconceived. (paras 51-54)

(3) Based on the Federal Court's observation in *Indira Gandhi*, the case was no longer exclusively about the plaintiff and Patmanathan's private rights concerning child custody. The dispute between the said parties had somewhat evolved into a challenge to the administration of justice

since Patmanathan had wilfully disobeyed the Ipoh High Court orders. The administration of justice would be brought into disrepute if a party against whom a committal order was issued after he was convicted of contempt wilfully disobeyed the court's order. Referring to the plaintiff's SOC, the plaintiff focused more on the failure of the IGP to take the necessary steps to repatriate Prasana Diksa to her pursuant to the recovery order. However, the recovery order no longer formed part of the *mandamus* order, and only the committal order remained. The present issue regarding the committal order did not affect the plaintiff's private rights as compared to the plaintiff's entitlement under the recovery order. The *mandamus* order regarding the committal order had encroached upon the realm of public law that was directly related to the administration of justice. By itself, this had eliminated the plaintiff's cause of action in relation to the committal order, which resulted in the plaintiff no longer having a specific cause of action that affected her personally. Therefore, the plaintiff was no longer entitled to pursue her claim based on her private rights due to the IGP's alleged failure to execute the committal order. (paras 57-60)

(4) The plaintiff's allegation that the IGP and PDRM had conducted a false investigation could not be concurred. This was due to the findings that: (i) the Criminal Investigation Department, which was entrusted to execute the *mandamus* order, had a well-trained and experienced team known as 'STAFOC' (Special Task Force On Organised Crime), which comprised of members with personal expertise. This team had 'enough firepower and expertise' to track down Patmanathan. This demonstrated PDRM's seriousness in resolving the issue; (ii) upon the issuance of the *mandamus* order, the IGP had instructed his officers to execute the same and locate Patmanathan. This investigation and efforts continued even after the IGP appealed the *mandamus* order to the Court of Appeal. The IGP and PDRM had further intensified their efforts to locate Patmanathan after the *mandamus* order in respect of the committal order was reinstated by the Federal Court. PDRM had even continued their search for Patmanathan in various parts of Perak and Kelantan; (iii) on the same day the Federal Court delivered its decision, the Officer in Charge of Police District for Ipoh issued a media release urging the public to contact the investigating officer with information about Patmanathan; (iv) one senior investigating officer, ASP Yap Siew Cheng, had requested information regarding Patmanathan from several Government agencies in order to determine whether Patmanathan had registered with an updated address; (v) pertaining the IGP's statement that he knew the whereabouts of Patmanathan, and a happy ending was being crafted for the plaintiff, it was concluded that at that time, the IGP had the general perception that Patmanathan was in Southern Thailand

based on intelligence reports and he felt obliged to provide this information to the media. The IGP clarified, however, that all processes would be handled through the court system. It was clear from the IGP's testimony that he was committed in solving the case and felt sympathy for the plaintiff. There was no justifiable reason to disbelieve his testimony; (vi) even if there was no proof that investigation had been conducted outside Malaysia, there was no doubt for the court to accept the IGP's testimony that the PDRM had sought the assistance of Interpol to locate Patmanathan as it was not inherently improbable; (vii) for the plaintiff to succeed in the tort of nonfeasance, she must demonstrate the existence of malice or bad faith. It was impossible for the court to conclude that the IGP and PDRM did not attempt to locate the whereabouts of Patmanathan; and (viii) it was not a scenario which Patmanathan was roaming around Kuala Lumpur or any other area in the presence of the police, without the police taking any action despite noticing his appearance. If such was the case, the factor would have been viewed in favour of the plaintiff. However, the facts indicated that Patmanathan's whereabouts were unknown. Considering these findings, it was concluded that the IGP and PDRM had exercised their duties in a manner they considered the most appropriate. The manner the investigation was conducted was within their wide discretion, and the court was not in the position to second guess them. Essentially, what mattered to the court was that there was evidence that an investigation had been conducted, and it was still in progress. (paras 65-77)

Case(s) referred to:

Hill v. Chief Constable Of West Yorkshire [1988] 2 All ER 238 ***(refd)***
Indira Ghandi Mutho v. Ketua Polis Negara [2016] 5 CLJ 353 FC ***(refd)***
Indira Gandhi Mutho v. Ketua Polis Negara & Ors [2022] 3 CLJ 417 HC ***(refd)***
Jay Laxmi Salt Works (P) Ltd v. The State Of Gujarat 1994 SCC (4) 1 ***(refd)***
PP v. Mohamed Ali [1962] CLJU 129; [1962] 1 LNS 129 HC ***(refd)***
Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors [2017] 9 CLJ 543 CA ***(refd)***
Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals [1995] 4 CLJ 427 SC ***(refd)***

Legislation referred to:

Child Act 2001, s. 53
Police Act 1967, s. 20
Rules of Court 2012, O. 53

For the plaintiff - Rajesh Nagarajan, Sachpreetraj Singh Sohanpal, Pavitra Loganathan & Vigines Shankar; M/s Raj & Sach
For the defendants - Andi Razalijaya A Dadi, Zetty Zurina Kamaruddin; SFCs & Safiyyah Omar; FC

Reported by Syamim Ariffin

JUDGMENT

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

[1] It is impossible to imagine the agony that the plaintiff has experienced. Her youngest daughter, Prasana Diksa d/o Patmanathan ("Prasana Diksa"), barely two years old at the time, was taken away from her sometime in 2010. The plaintiff's anguish and pain as a mother have persisted to the present time. Sadly, the plaintiff has never met her youngest daughter again. It is unknown where the beautiful daughter of hers is located.

[2] The plaintiff initiated several actions and proceedings in court regarding this matter. The dispute before me is one such action that has been filed by the plaintiff.

[3] The plaintiff is seeking a declaration that the first defendant, the Inspector General of Police ("IGP") at the time, has failed to take all necessary steps to apprehend Patmanathan s/o Krishnan (also known as Muhammad Riduan bin Abdullah) and retrieve Prasana Diksa, thereby committing the tort of nonfeasance in public office. The plaintiff also seeks to declare that the Royal Malaysian Police ("PDRM"), the Home Ministry and the Government of Malaysia are vicariously liable for the alleged tort of nonfeasance committed by the IGP.

[4] Apart from that, the plaintiff is also seeking general, aggravated and exemplary damages.

[5] The trial of this action was concluded in just one day, which was sufficient for the plaintiff ("PW1") to testify and then followed by the defendants' witnesses, Tan Sri Dato' Seri Abdul Hamid bin Bador ("DW1"), the former IGP, and ASP Yap Siew Cheng ("DW2"), the senior investigating officer responsible for executing the warrant of committal against Patmanathan.

An Overview Of The Facts Of The Case

[6] The plaintiff and Patmanathan s/o Krishnan ("Patmanathan") were married on 10 April 1993 in accordance with the Law Reform (Marriage and Divorce) Act 1976.

[7] The couple has three children. At the time of filing this action in 2020, their eldest daughter was 23 years old, their middle son was 22 and Prasana Diksa was 12.

[8] On 11 March 2009, Patmanathan converted to Islam, followed by the conversion of his three children. Although the plaintiff is the mother of the children, she was not made aware of all this.

[9] It was then that the dispute began to take shape.

[10] The Perak Syariah High Court granted Patmanathan custody of the three children on 29 September 2009.

[11] In light of this, and as a valid means of protecting her interests, the plaintiff applied to the Civil High Court of Malaya in Ipoh for custody of their three children. On 11 March 2010, the Ipoh High Court granted the plaintiff custody of the three children.

[12] Nevertheless, following the granting of the custody order by the Ipoh High Court, Patmanathan forcibly took Prasana Diksa away from the plaintiff.

[13] In the wake of the inconceivable and unavoidable circumstances surrounding the plaintiff and Patmanathan's relationship, the plaintiff filed a petition for divorce against him at the Ipoh High Court. Following this, the High Court granted an order for divorce on 8 August 2012.

[14] Meanwhile, as a result of Patmanathan's refusal and neglect to return Prasana Diksa to the plaintiff, the plaintiff applied to the Ipoh High Court for an order that Patmanathan be committed to prison until the said contempt was purged by the delivery of Prasana Diksa to the plaintiff. This order was obtained on 30 May 2014 ("committal order").

[15] Further, the plaintiff also obtained a recovery order from the Ipoh High Court on 30 May 2014 ("recovery order") in accordance with s. 53 of the Child Act 2001, directing the court bailiff and the PDRM to conduct a search, retrieve Prasana Diksa from Patmanathan and subsequently return Prasana Diksa to the plaintiff.

[16] Even though the committal order and recovery order existed at the time, the IGP failed to execute those orders because he was faced with two conflicting orders at the time, namely, the order of the Perak Syariah High Court granting Patmanathan custody of the plaintiff's three children and the order of the Ipoh High Court granting the plaintiff custody of the three children.

[17] It was the contention of the IGP that executing the custody order of the Ipoh High Court would constitute contempt of the order from the Perak Syariah High Court.

[18] As a result of all these challenges, the plaintiff was forced to seek judicial review from the Ipoh High Court under O. 53 of the Rules of Court 2012 in order to obtain an order of *mandamus* requiring the IGP to execute and enforce the committal order and recovery order.

[19] The Ipoh High Court allowed the plaintiffs judicial review application on 12 September 2014, and a *mandamus* order was issued against the IGP to compel him to execute the warrant of committal and the recovery order ("*mandamus* order").

[20] The IGP appealed the *mandamus* order. On 17 December 2014, the Court of Appeal, by a majority judgment, allowed the appeal.

[21] In light of the Court of Appeal's decision to overturn the *mandamus* order, the plaintiff filed a leave application to appeal further to the Federal Court. On 22 April 2015, the leave application was allowed.

[22] On 29 April 2016, the Federal Court delivered a decision in which it clearly stated that Patmanathan should be apprehended to face justice, and for this to be accomplished the PDRM must execute the warrant of committal. The Federal Court further ruled that the IGP could not refuse to command his officers to execute the warrant of committal issued by the civil High Court. Therefore, the Federal Court determined that the *mandamus* order could be issued against the IGP when he announced his intention not to execute the warrant of committal. The Federal Court also ordered that the matter be remitted to the Ipoh High Court so that the High Court Judge could monitor the progress of the execution of the warrant of committal against Patmanathan.

[23] Dissatisfied with the IGP's alleged lack of interest in arresting Patmanathan and handing Prasana Diksa over to the plaintiff despite knowing the location of Patmanathan, the plaintiff initiated this action on 28 October 2020.

[24] That concludes the facts.

Issues To Be Tried

[25] As far as I am aware, the parties have not agreed on any common issues to be tried. Only fourteen of the plaintiff's issues are before me for trial. However, based on the facts presented to me and upon further reliance on the parties' pleadings herein, I am of the opinion that this dispute can be justly decided by narrowing those issues into a couple of main issues sufficient to determine the plaintiff's cause of action as well as the defendants' defence.

[26] In light of this dispute, the following key issues need to be addressed:

(i) whether the IGP is liable for committing the tort of nonfeasance in public office by failing to take all necessary steps to apprehend Patmanathan and retrieve Prasana Diksa?

(ii) whether the IGP deliberately failed to act on the *mandamus* order?

(iii) whether the second, third and fourth defendants failed to ensure that the IGP enforced the *mandamus* order diligently?

(iv) whether the second, third and fourth defendants are vicariously liable for the IGP's alleged act of nonfeasance?

(v) if the above answers are affirmative, then in terms of damages, whether the plaintiff has suffered any pain and suffering as a result thereof?

A **The Plaintiff's Case**

[27] According to the plaintiff, the IGP stated in a media statement on 27 January 2020 that Patmanathan's location was known and that a 'happy ending' was being crafted for the plaintiff. In this regard, the plaintiff asserts that the IGP's statement indicated that despite knowing Patmanathan's exact whereabouts, the IGP had not arrested Patmanathan or handed Prasana Diksa over to the plaintiff.

[28] Thus, the conduct of the IGP, and by extension, that of the rest of the defendants, has directly and indirectly caused and prolonged the separation between the plaintiff and her youngest daughter, Prasana Diksa. Consequently, the defendants' conduct and failure to act have directly and indirectly enabled Patmanathan to evade capture.

[29] Due to the plaintiff's constant concern for Prasana Diksa's safety and well-being, she has suffered pain and anxiety after being unlawfully separated from her daughter.

The Defendants' Defence

[30] As for the defendants, they claim that despite an appeal against the *mandamus* order, the IGP and PDRM have continued to investigate and locate Patmanathan.

[31] Following the Federal Court's decision on 29 April 2016, the IGP and PDRM increased their efforts to ensure the *mandamus* order was carried out.

[32] In this regard, numerous press releases, police reports, and police operations have been conducted by the IGP and PDRM with the goal of apprehending Patmanathan and returning Prasana Diksa to the plaintiff.

[33] They never lost sight of that goal, which continues to this day.

The Court's Analysis And Findings

[34] The following is the court's analysis and findings.

[35] As highlighted above, this claim against the IGP and the rest of the defendants is based on the tort of nonfeasance in public office on the IGP's part, which is based on the failure to enforce the *mandamus* order by failing to arrest Patmanathan in accordance with the committal order and failing to retrieve Prasana Diksa in accordance with the recovery order, both issued by the Ipoh High Court on 30 May 2014.

[36] Furthermore, as previously mentioned, the plaintiff alleged that the conduct of the IGP not only caused and extended the separation between her and Prasana Diksa, but also enabled Patmanathan to evade arrest. As a result, the plaintiff has been unlawfully separated from Prasana Diksa, causing her anxiety and pain.

[37] Taking this issue as a starting point, the legal position appears to be well established that the tort of nonfeasance refers to the failure or omission by a public officer or public authority to perform a legal duty.

[38] Against this backdrop, learned counsel for the defendants has urged this court to hold that, in order to establish a cause of action for nonfeasance, there must be a clear indication within the legislation that liability shall be imposed for nonfeasance. Learned counsel further argued that, in the absence of such imposition of liability under the law, a person injured by the mere non-performance of a duty cannot sue the public authority for damages.

[39] From this perspective, it is obvious to me that the first step in determining whether the IGP committed a tort of nonfeasance is to establish whether the IGP owed the plaintiff a duty of care.

[40] In an effort to achieve this, I will seek guidance from the Court of Appeal case of *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* [2017] 9 CLJ 543, which recognised the applicability of the cause of action of nonfeasance in a Malaysian context. When delivering the judgment, His Lordship Vernon Ong Lam Kiat JCA (as His Lordship then was) examined extensively the circumstances in which a breach of statutory duty could lead to liability for such a tort. Observations by His Lordship appear at pp. 550 and 551:

> Liability For Breach Of Statutory Duty
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> [13] At common law, a statutory duty frequently gives rise to a liability to a civil action (*Bux v. Slough Metals Ltd* [1973] 1 WLR 1358; *London Passenger Transport Board v. Upson* [1949] AC 155). There are three categories of liability arising out of a breach of statutory duty. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there the party can only proceed by action at common law. The third class is where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it (*Wolverhampton New Waterworks Co v. Hawsford* (1859) 6 CB (N.S.) 336, 356).
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> [14] In this regard, it is pertinent to refer to the provision of ss. 5 and 7 of the GPA 1956 which read as follows:
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> Liability of the Government in tort

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5. Subject to this Act, the Government shall be liable for any wrongful act done or neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

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Savings of acts done in exercise of public duties

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7. (1) Notwithstanding any other provisions of this Act to the contrary no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.

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(2) For the purposes of subsection (1) the expression "exercise of the public duties" includes:

(a) the construction, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges;

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(b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;

(c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and

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(d) the maintenance, diversion and abandonment of the channels of rivers and waterways.

(3) Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.

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(4) Nothing in this Act shall subject the Government, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity.

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[15] In our view, the common law right to bring an action for negligence for breach of statutory duty has been accorded statutory recognition under the GPA 1956; and that the liability which has been established falls under the third class of cases - *ie*, where the statute (the GPA 1956) creates a liability which does not exist at common law, *ie*, liability for acts of nonfeasance on the part of the Government in the exercise of its public duties.

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[41] In dealing with this issue in more detail, I would be remiss if I failed to cite the observations made by His Lordship Mohd Nazlan Ghazali J (as His Lordship then was) in *Indira Gandhi Mutho v. Ketua Polis Negara & Ors* [2022] 3 CLJ 417 when dismissing the defendants' application to strike out the plaintiff's action. Here, His Lordship observed that the IGP and PDRM have a duty to apprehend and commit a person to prison when a warrant of committal or a *mandamus* order is issued by the court. Failure on their part to do so may be a basis for bringing an action in tort against them for nonfeasance in public office. His Lordship had the following to say about this at pp. 429 and 430:

> [32] As such, it is argued by the defendants that in order for the plaintiff to establish a cause of action of nonfeasance in common law, there must be a clear indication in the legislation that liability shall be imposed for the non-performance of a duty.
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> [33] I do not disagree with this proposition. I agree that a mere failure by a public authority to exercise its duty will not attract liability of nonfeasance unless it is clearly specified under the law. I also agree that the leading authority presently on the doctrine of nonfeasance in public office in Malaysia is the decision of the Court of Appeal in *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* [2017] 9 CLJ 543 where it was held that the Government Proceedings Act 1956 ("the GPA"), particularly ss. 5 and 7(3) create a liability which does not exist at common law ie, the liability for acts of nonfeasance on the part of the Government in the exercise of public duties.

[42] As part of His Lordship's further consideration of this issue, His Lordship also referred to s. 20 of the Police Act 1967, which provides for general police duties under the command of the IGP. His Lordship analysed at pp. 432 to 434 that nonfeasance in public office is actionable not just if it arose from a statutory duty as stipulated in s. 20 of the Police Act 1967 but also if it arose from a court order:

> [42] In any event, the plaintiff's assertion that the duty may be said to be imposed by s. 20 of the Police Act 1967 is also not without merit. The general duties of police officers under the command of the first defendant are provided for under this statutory provision which reads:
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> 20. General duties of police officers
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> (1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.
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> (2) Where any duty, power or discretion is imposed or conferred by or under this Act or any other law on a police officer of any specified rank or holding any specified office, such police officer shall, in the performance of such duty or the exercise of such power or discretion,

A be subject to the orders and directions of any police officer to whom he is directly subordinate, and any such last-mentioned police officer, if the occasion arises and he deems it expedient so to do, shall himself perform any such duty or exercise any such power or discretion.

(3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including:

(a) apprehending all persons whom he is by law authorised to apprehend;

(b) processing security intelligence;

(c) conducting prosecutions;

(d) giving assistance in the carrying out of any law relating to revenue, excise, sanitation, quarantine, immigration and registration;

(e) giving assistance in the preservation of order in the ports, harbours and airports of Malaysia, and in enforcing maritime and port regulations;

(f) executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority;

(g) exhibiting information;

(h) protecting unclaimed and lost property and finding the owners thereof;

(i) seizing stray animals and placing them in a public pound;

(j) giving assistance in the protection of life and property;

(k) protecting public property from loss or injury;

(l) attending the criminal courts and, if specially ordered, the civil courts, and keeping order therein; and

(m) escorting and guarding prisoners and other persons in the custody of the police.

(4) A police officer shall when performing the duties mentioned in paragraph (3)(m) be deemed to be a prison officer, and shall have all the powers, protection and privileges attached to a prison officer.

[44] As such, in my judgment, contrary to the assertions of the defendants, the suit discloses a reasonable cause of action as the tort of nonfeasance under Malaysian law is also recognised under s. 5 of the GPA which provides that the government is liable in tort when any public officer commits any wrongful act, neglect or default in relation to a duty imposed by law. Nonfeasance in public office is in my view actionable not only if the duty is statutory in nature (such as s. 20 of the Police Act 1967)

but also, and probably even more so, if it arises from an order of court, which in this case is the committal order as well as the *mandamus* order, as affirmed by the Federal Court.

[43] Consequently, in light of the trite legal position discussed by the Court of Appeal in *Raymond Cheah Choon Sing v. Jurutera Daerah, Jabatan Kerja Raya Seberang Perai Tengah & Ors* (*supra*) and the findings of this court in dismissing the defendants' striking out application in this instant case, I hold that the defendants' argument on this preliminary issue is, therefore, without merit.

Enforceability Of The Recovery Order

[44] Now that I have addressed such a preliminary issue, I will move on to the main issue in relation to the plaintiff's claim that the IGP and PDRM have committed acts of nonfeasance by not complying with the Ipoh High Court orders dated 30 May 2014, which they have allegedly failed to fulfil or neglected to carry out.

[45] In order to examine the plaintiff's cause of action, I must first analyse the key issue surrounding the *mandamus* order. Here is what it is. Would the plaintiff's cause of action make it appropriate to apply the doctrine of the tort of nonfeasance in the present case?

[46] In regard to this issue, the defendants assert that the tort of nonfeasance is not actionable in the present case. This is due to the fact that the *mandamus* order relates only to the committal order. The defendants point out that the Federal Court on 29 April 2016 only allowed the *mandamus* order to be issued against the IGP for the purpose of executing the committal order and not the recovery order.

[47] In her response to this issue, the plaintiff asserts that neither the committal order nor the recovery order has been appealed against nor set aside. Therefore, the two orders remain legally binding. The plaintiff further asserts that an order of a court is binding until and unless it has been overturned by a higher court.

[48] In support of her argument, the plaintiff cites *Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427; [1995] 3 MLJ 549. As Wan Adnan FCJ observed at p. 436 (CLJ); p. 575 (MLJ), until and unless it is set aside, a court's order is valid and must be obeyed:

In my view, these points are not relevant in contempt of court proceedings. They are relevant and may be valid in proceedings to set aside the injunction. In the instant case, the interim injunction order was made *ex parte*. Until and unless it is set aside, the order is valid and must be obeyed. In my view, the correct position is that once an interim injunction has been granted, it must be obeyed. If the person against whom the order is made feels that the injunction order ought not to have

been made for any reason, he must apply to have it set aside. Until it is set aside, he must respect and obey it. (See *Wee Choo Keong v. MBf Holdings & Anor and another appeal* [1993] 2 MLJ 219).

[49] The plaintiff further contends that the Federal Court's decision of 29 April 2016 pertains only to the judicial review application filed by the plaintiff and not to the earlier committal order and recovery order that were issued by the High Court. At all material times, the validity of the court orders namely the committal order and recovery order is not affected.

[50] In order for me to appreciate the arguments of the parties, I must first examine the Federal Court's decision mentioned earlier in *Indira Ghandi Mutho v. Ketua Polis Negara* [2016] 5 CLJ 353; [2016] 3 MLJ 141. At pp. 362 to 363 (CLJ); pp. 151 and 152 (MLJ) of the Federal Court judgment, His Lordship Raus Sharif PCA (as His Lordship then was) made the following observations:

> [23] In dealing with the recovery order we wish to refer to the recent decision of this court in *Viran a/l Nagapan v. Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585. In that case, the IGP was also confronted with two custodial orders. One was the Syariah High Court's order dated 19 September 2013, which granted custody of the children to the ex-husband. The other was the Civil High Court's order dated 7 April 2014, which gave custody of the children to the ex-wife. However, two days after the custody order was granted in favour of the ex-wife, one of the children, namely Mithran a/l Viran was taken away by the ex-husband. The ex-wife then applied for recovery order before the Civil High Court pursuant to s. 53 of the Child Act. The learned High Court judge granted the ex-wife's application. The decision of the High Court was affirmed by the Court of Appeal.
>
> [24] Before this court, one of the questions of law posed was: Whether on the interpretation of sections 52 and 53 of the Child Act 2001, a Recovery Order can be made where there exists a custody order given by the Syariah Court which is enforceable at the same time.
>
> [25] This court answered the above question in the negative. The court was of the view that a recovery order can only be issued in circumstances provided for in s. 52 of the Child Act and can only be obtained if the elements in s. 53 of the same Act are fulfilled. The elements to be fulfilled are: (a) the court has reason to believe that a child has been taken or sent away; or (b) the act is done without the consent of the person who has lawful custody of the child.
>
> [26] It was decided in that case that the phrase 'lawful custody of a child' in s. 52(2) of the Child Act includes a person who has been conferred custody by virtue of any written law or by an order of a court including a Syariah Court. Thus in that case, it was held that since there was a custody order by the Syariah High Court giving custody to the ex-husband, the High Court could not possibly issue a recovery order under s. 52 of the Child Act. The Civil High Court could not direct the

IGP or his officers to execute the recovery order as both the Syariah High Court order and the Civil High Court order bind the IGP and his officers either way and the execution and performance of one order was impossible without being in contempt of the other.

[27] Similarly, in the present case, there are two conflicting custodial orders. One was the Syariah High Court order giving custody of the children to Pathmanathan. The other was the Civil High Court order which gave custody of the children to the appellant. As such, we are of the view that the recovery order should not have been given by the Civil High Court because like the *Viran a/l Nagapan*'s case the pertinent element under s. 52 of the Child Act had not been fulfilled. No order of *mandamus* can be issued when such right is doubtful and not free from any reasonable controversy (see *Koon Hoi Chow v. Pretam Singh* [1972] 1 MLJ 180b).

[28] Based on the above, the IGP can be excused for not taking any action to enforce the recovery order.The IGP's quandary over the matter is well founded.

[51] Following a detailed analysis of the matter, the Federal Court concluded that since the Syariah High Court had given Patmanathan custody of the child, the High Court could not possibly issue the recovery order under s. 53 of the Child Act. In the Federal Court's view, the Civil High Court could not direct the IGP or his officers to execute the recovery order since both the Syariah High Court and the Civil High Court orders bind the IGP and his officers either way, and executing one order would result in contempt for the other.

[52] Having examined the reasoning of the Federal Court, it seems clear as day that the Federal Court has partially upheld the decision of the Court of Appeal, which had set aside the *mandamus* order in respect of the recovery order. Thus, I find that there was no *mandamus* order issued to the IGP to enforce or execute the recovery order.

[53] In further considering the plaintiff's argument that the recovery order has not been set aside and still exists, I conclude that even if the recovery order has not been set aside, it clearly has the effect of having been set aside as a result of the Federal Court's decision. This conclusion is based on the fact that the Federal Court found that the Civil High Court could not direct the IGP to execute the recovery order.

[54] As a result of such findings above, I agree with the learned Senior Federal Counsel's argument that, in light of the plaintiff's statement of claim, the claim of nonfeasance with respect to the IGP's failure to execute the recovery order is clearly a non-starter and misconceived.

Status Of The Committal Order

[55] My next focus will be on the plaintiff's claim that the IGP refused to execute and enforce the warrant of committal against Patmanathan.

[56] As a first step in answering this issue, I must first discuss the origin of the surrounding background. Upon receiving the committal order and recovery order from the Ipoh High Court and upon the alleged non-action of the IGP, the plaintiff filed the application for judicial review in the Ipoh High Court. There are two stages to the proceedings here: the first stage is obtaining the committal and recovery orders, and the second stage is judicial review proceedings.

[57] As I have identified the existence of both stages of the proceedings, I would like to draw further guidance from the observations of the Federal Court in *Indira Ghandi Mutho v. Ketua Polis Negara* (*supra*). The purpose of this is to distinguish between the two proceedings involved therein. After relying on the Federal Court's observation, I conclude that the case is no longer exclusively about the plaintiff and Patmanathan's private rights concerning child custody. According to the Federal Court, the dispute between the parties has somewhat evolved into a challenge to the administration of justice since Patmanathan has wilfully disobeyed the Ipoh High Court's order. The Federal Court found, therefore, that the administration of justice would be brought into disrepute if a party against whom a warrant of committal was issued after he was convicted of contempt wilfully disobeyed the court's order.

[58] In light of the Federal Court's observation, I must now refer to the plaintiff's statement of claim. As stated in her statement of claim, the plaintiff focuses more on the failure of the IGP to take the necessary steps to repatriate Prasana Diksa to the plaintiff pursuant to the recovery order. Nevertheless, as I mentioned earlier, the recovery order no longer forms part of the *mandamus* order as of this time. At this stage, it is only the committal order that remains.

[59] Based on this perspective and upon further analysis of the plaintiff's statement of claim and after comparing the Federal Court's observation with the plaintiff's cause of action based on the committal order, I am of the opinion that the present issue regarding the warrant of committal does not affect the plaintiff's private rights as compared to the plaintiff's entitlement under the recovery order. The *mandamus* order in regard to the warrant of committal has now encroached upon the realm of public law that is directly related to the administration of justice. By itself, this has eliminated the plaintiff's cause of action in relation to the warrant of committal. This results in the plaintiff no longer having a specific cause of action that affects her personally.

[60] As a result of making such findings, I find that the plaintiff is no longer entitled to pursue her claim based on her private rights as a result of the IGP's alleged failure to execute the warrant of committal.

Investigative Measures Taken By The Police

[61] There is more to my analysis than this.

[62] For completeness, I will now examine whether the IGP has committed the tort of nonfeasance due to his failure and/or omission to execute the *mandamus* order, assuming I am incorrect in my earlier two-stage findings.

[63] In this regard, the plaintiff argues that the elements of her claim against the defendants have been successfully proven based on four issues involving the nature and effect of the police investigation. The plaintiff claims that firstly, the PDRM conducted a fake investigation, secondly, there was no evidence of investigation outside Malaysia that was presented by the police during the trial, thirdly, the IGP's failure to adhere to the recovery order and fourthly, he failed to adhere to the order of the Federal Court.

[64] Therefore, from this perspective, it is the plaintiff's argument that the cause of action herein is predicated upon the tort of nonfeasance since it is undeniable that the IGP failed to adhere to both the Ipoh High Court *mandamus* order dated 12 September 2014 and the Ipoh High Court orders of 30 May 2014.

[65] In light of my anxious consideration of this matter, and after balancing both versions of the facts, I am unable to concur with the plaintiff's claim that the IGP and PDRM conducted a false investigation. The plaintiff's arguments that the police ought not to conduct the investigation using the Special Task Force On Organised Crime ("STAFOC") because Patmanathan did not participate in organised crime, such as mafia activities, but only kidnapped his own daughter did not convince me to support her arguments for the reasons given below.

[66] In accordance with the IGP's testimony, the Criminal Investigation Department ("CID"), which was entrusted with executing the *mandamus* order, had a well-trained and experienced team, known as STAFOC, comprised of members with personal expertise. According to the IGP, in his own words, this team had 'enough firepower and expertise' to track down Patmanathan. This demonstrates that the PDRM took this matter seriously enough to use its highest level of expertise to resolve this issue.

[67] In fact, the IGP has further testified that upon the issuance of the *mandamus* order by the Ipoh High Court for the IGP to execute the warrant of committal and to return Prasana Diksa to the plaintiff, the IGP instructed his officer to execute the *mandamus* order and locate Patmanathan. It is important to note that this investigation and efforts continued even after the IGP appealed the *mandamus* order to the Court of Appeal. The IGP and the PDRM have further intensified their efforts to locate Patmanathan as a result

of the Federal Court's decision to reinstate the *mandamus* order in part specific to the committal order. According to the evidence in this case, the PDRM continued to search for Patmanathan in various parts of Perak and Kelantan.

[68] Moreover, on the same day that the Federal Court delivered its decision, the officer in charge of police district ("OCPD") for Ipoh issued a media release urging the public to contact the investigating officer with information about Patmanathan.

[69] It does not end there. In addition, the evidence suggests that ASP Yap Siew Cheng, as the senior investigating officer, requested information about Patmanathan from the Employees Provident Fund ("EPF"), the Inland Revenue Department ("LHDN"), the Election Commission, the Perak Education Department and the National Registration Department's Perak branch. This aimed to determine whether Patmanathan had registered with an updated address.

[70] As a matter of fact, even if the plaintiff challenges the validity and effectiveness of the searches conducted by the PDRM because they involved other forms of vice activities as opposed to what Patmanathan is accused of, I find that they still constitute part and parcel of the police investigation into this matter, regardless of where they were conducted or the nature of the investigation. From my perspective, this is only one segment of the larger investigation undertaken by the IGP and PDRM.

[71] As to the allegation that the IGP was aware of the whereabouts of Patmanathan when he was looking for a happy ending in terms of settling this matter amicably for all parties concerned, I conclude that the IGP had the general perception that Patmanathan was in Southern Thailand based on intelligence reports and that he felt obliged to provide this information to the media. He clarified, however, that all processes would have to be handled through the court system. It is clear from the IGP's testimony that he was committed to solving the case and felt sympathy for the plaintiff to the extent of sending his officers to convince her to meet him. As far as this is concerned, I have no justifiable reason to disbelieve the testimony of the IGP.

[72] Furthermore, even if there is no proof that an investigation was conducted outside Malaysia, I have no doubt in accepting the IGP's testimony that the police had sought the assistance of Interpol in locating Patmanathan. As a result, I believe that the IGP was testifying on a matter which was not inherently improbable.

[73] Specifically in this regard, I am drawing upon the general observations that were made in *PP v. Mohamed Ali* [1962] CLJU 129; [1962] 1 LNS 129; [1962] 1 MLJ 257 regarding the acceptance of evidence given by the police

that is not inherently improbable and particularly when it is not contradicted or shaken during cross-examination. His Lordship Thomson CJ developed this aspect of judicial reception of evidence at p. 258 as follows:

> In the second place, the refusal to accept the evidence of the Police witness was very offensive. That witness said there was a 20 miles per hour speed limit in force. His evidence was not accepted and the only reason stated for refusing to accept it was that no evidence was "adduced to substantiate it". The witness is a traffic policeman, presumably by reason of his rank of some experience. He was unlikely to be mistaken and to refuse to accept his evidence on a point like this on the ground that it was not "substantiated" was neither more nor less than to call him a liar.
>
> If Magistrates are going to adopt this sort of attitude to Police evidence in connection with road traffic cases there will be an end to all law enforcement in the country. When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted.

[74] In this context, having all that evidence before me and coupled with the fact that in order for the plaintiff to succeed in the tort of nonfeasance, the plaintiff still must demonstrate the existence of malice or bad faith, it is impossible for me to conclude that the IGP and PDRM did not attempt to locate the whereabouts of Patmanathan.

[75] Thus, from this perspective, the following discussion appears in *Jay Laxmi Salt Works (P) Ltd v. The State Of Gujarat* 1994 SCC (4) 1, JT 1994 (3) 492 regarding the requirement to show malice or bad faith in a cause of action for nonfeasance:

> *The words are undoubtedly of very wide import. They are strong expressions as well. Malfeasance and nonfeasance bring into motive, intention, malice etc.* Law of torts, however, is not confined and cannot be strictly categorised. Where the State undertakes common law duty its actions may give rise to common law tort. Negligence in performance of duty is only a step to determine if action of Government resulting in loss or injury to common man should not go uncompensated. If construction of bundh is a common law or public duty then any loss or damage arising out of it gives rise to tortious liability not in the conservative sense but certainly in the modem and developing sense. A common man, a man in the street cannot be left high

A and dry because wrongdoer is State. The basic element of tort is duty. And that comes into play fully when there is a common law duty. Since construction of bundh was a common law duty any injury suffered by a common man was public tort liable to be compensated. Can it be said to be covered in the expressions used in Article 36? Malfeasance and misfeasance necessarily import intention, knowledge and malice, therefore, they may not be available in every tortious liability arising out of violations of public duty. Evil doing or ill conduct postulates something more than mere omission or commission. Misfeasance is now recognised as imputable to discharge of duty arbitrarily. In *Calveley v. Chief Constable of the Merseyside Police* it was held that for the tort of misfeasance it was necessary that the public officer must have acted maliciously or with bad faith. *In Dunlop v. Woollahra Municipal Council it was held that without malice the claim for misfeasance could not be accepted. Non-feasance on the other hand is omission to discharge duty. But the omission to give rise to action in torts must be impressed with some characteristic, namely, malice or bad faith. The expressions 'malfeasance', 'misfeasance' and 'nonfeasance' would, therefore, apply in those limited cases where the State or its officers are liable not only for breach of care and duty but it must be activated (sic actuated) with malice or bad faith.* The defective planning in construction of a bundh, therefore, may be negligence, mistake, omission but to say that it can only be either malfeasance, misfeasance and nonfeasance is not correct. Observations in Bhayaji to the following effect, "The words 'malfeasance, misfeasance, or nonfeasance independent of contract' used in Article 36, are of the widest import, and embrace all possible acts or omissions, commonly known as torts by English lawyers; that is to say, wrongs independent of contract." (emphasis added)

[76] Aside from that, this is certainly not a scenario in which Patmanathan was roaming around Kuala Lumpur or any other area in the presence of the police, without the police taking any action despite noticing his appearance. If this were the case, I would have viewed that factor in favour of the plaintiff. However, the facts before me indicate that Patmanathan's whereabouts were unknown. Evidence further suggests that he was in Thailand at some point in time.

[77] As a conclusion, my interpretation of the evidence suggests that all the efforts made by the IGP and PDRM were not indicative of any neglect of their duties. Moreover, based on the evidence available to me, I conclude that the IGP and PDRM exercised their duties in the manner they considered to be most appropriate. The manner in which they conducted their investigation is within their wide discretion, and I am in no position to second-guess them. Essentially, what matters to me is that there is evidence that an investigation has been conducted and is still in progress.

[78] This conclusion is supported by the case of *Hill v. Chief Constable of West Yorkshire* [1988] 2 All ER 238. This case dealt with the issue of wide discretion on the part of the police in the discharge of their duties. The following is part of Lord Keith of Kinkel's speech when speaking for the House of Lords at pp. 240 and 241:

> By common law police officers owe to the general public a duty to enforce the criminal law: see *R v. Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118. That duty may be enforced by *mandamus*, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision on such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying on chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged. That is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public.

[79] As a result, I accept the testimony of Tan Sri Dato' Seri Abdul Hamid bin Bador ("DW1") and ASP Yap Siew Cheng ("DW2") in relation to the entire investigation scenario. I further find that neither the IGP nor PDRM have any ill intentions in this matter.

Conclusion

[80] In light of my findings above, I am constrained to dismiss the plaintiff's claim against the defendants.

[81] Nevertheless, given the nature and circumstances surrounding this dispute, I make no order regarding costs.